Supreme Court, U.S.
FILED

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No. ——OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

GEORGES TABCHOURI,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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32 pp

QUESTION PRESENTED

In immigration proceedings involving individuals with no criminal record, the Board of Immigration Appeals, even where it denies all other relief, will in nearly all cases grant a brief period during which such persons may depart the country voluntarily, thereby allowing them to avoid deportation and resultant bars to reentry.

These individuals have the right to seek judicial review in the U.S. Circuit Courts of Appeals of the Board's decisions generally. Some such courts have held, however, that they cannot or will not reinstate the Board's voluntary departure grant if the appeal from the Board's decision is dismissed, and that such remedy can only be sought from the Immigration and Naturalization Service. Persons seeking judicial review in these jurisdictions therefore face the possibility of losing the minimal relief of voluntary departure granted by the Board, merely because they choose to exercise their appeal rights as to other relief that was denied. Voluntary departure is routinely granted, however, in some other appeals courts: i.e., the U.S. Circuit Courts of Appeals are irreconcilably split on this issue.

The question presented is:

Can and should the U.S. Circuit Courts of Appeals reinstate or otherwise preserve a grant of voluntary departure by the Board of Immigration Appeals?

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES, MAY IT PLEASE THE COURT:

Petitioner Georges Tabchouri respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgments of the United States Court of Appeals for the Fifth Circuit entered in this matter on June 17, 1997.

OPINIONS AND JUDGMENTS BELOW

The opinion and judgment of the three-judge panel of the United States Court of Appeals for the Fifth Circuit, entered on June 17, 1997, are reprinted in the Appendix to this Petition at pages App. 1 through App. 2. The order of the United States Court of Appeals for the Fifth Circuit entered on August 8, 1997, staying the issuance of its mandate, is reprinted in the Appendix at page App. 3. The decision and order of the Board of Immigration Appeals, filed September 9, 1996, are reprinted in the Appendix at pages App. 4 through App. 7. The decision and order of the Immigration Judge, filed August 24, 1995, are reprinted in the Appendix at pages App. 8 through App. 17.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 17, 1997, affirming the Board of Immigration Appeals' decision dated

September 9, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. Sect. 1254(1) and SUP. CT. R. 20.1.

STATUTES INVOLVED

This case involves the following provision of the United States Code:

former 8 U.S.C. Sect. 1254(e)(1)

> Except as provided in paragraph (2), the Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), (18), or (19) of section 241(a) (and also any alien within the purview of such paragraphs if he is also within the provisions of paragraph (2) of subsection (a) of this section) to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

STATEMENT OF THE CASE

I. Basis for Federal Jurisdiction in the Court of First Instance

Georges Tabchouri herein seeks review of the decision by the Court of Appeals for the Fifth Circuit on his

Petition for Review taken from the administrative decision by the Board of Immigration Appeals ("BIA") in deportation proceedings. The Fifth Circuit's jurisdiction was invoked under former 8 U.S.C. Sect. 1105a(a), which established the exclusive procedure for judicial review of such administrative decisions.

II. Statement of Facts

Mr. Tabchouri, a native and citizen of Lebanon, entered the U.S. in legal nonimmigrant student status on March 24, 1987, and has resided in this country continuously since then. Certified Administrative Record ("A.R."), as filed with the U.S. Court of Appeals for the Fifth Circuit in Case No. 96-60601, at 2. His legal student status expired in December 1991. A.R. at 2. He has no criminal record and has been a person of good moral character throughout his residence in this country. A.R. at 22.

III. Proceedings Below

Mr. Tabchouri was charged with deportability under former 8 U.S.C. Sect. 1251(a)(1)(B), for having overstayed his nonimmigrant visa. A.R. at 233. He conceded deportability and filed a claim for suspension of deportation under former 8 U.S.C. Sect. 1254(a) (based upon the hardship that he and his family in the U.S. would suffer should he be deported), and in the alternative for voluntary departure under former 8 U.S.C. Sect. 1254(e). A.R. at 33; 65-66.

The Immigration Judge held that Mr. Tabchouri had failed to establish the "extreme hardship" required for

suspension of deportation, but granted him the privilege of departing voluntarily within two months in lieu of deportation. A.R. at 27-29. The BIA agreed that Mr. Tabchouri had failed to prove "extreme hardship," and thus upheld the denial of suspension of deportation; it also agreed that he merited voluntary departure, and reinstated this relief for a period of thirty days. A.R. at 3.

Upon judicial review, the Fifth Circuit affirmed the suspension denial. It did not reinstate or even mention the voluntary departure grant. See Appendix hereto attached, at App. 2.

REASONS FOR GRANTING THE WRIT

As discussed below, nine of the thirteen U.S. Circuit Courts of Appeals are squarely in conflict over judicial treatment of administrative voluntary departure grants. Such a dispute has long been recognized as a valid ground for granting the writ of certiorari. *McElroy v. United States*, 455 U.S. 642, 643 (1982); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 373 (1981); *Marks v. United States*, 430 U.S. 188, 189 (1977). The controversy over voluntary departure is a longstanding and live controversy that will not die away or be resolved by further litigation in the lower Courts, who have taken their positions firmly and after careful consideration, including citation and discussion of conflicting precedents. *Cf. McCray v. New York*, 461 U.S. 961, 963 (1983). The situation cries out for Supreme Court intervention.

What follows is a summary of the conflicting positions taken by the U.S. Circuit Courts of Appeals on the issue at bar.

First Circuit

In *Umanzor-Alvarado v. INS*, 896 F.2d 14, 16 (1st Cir. 1990), the First Circuit held that it did have the power to reinstate a BIA grant of voluntary departure, and that it would do so absent any indication that the appeal was dilatory or meritless, or any allegation by INS of ineligibility for such relief. The *Umanzor-Alvarado* court stated that it saw "nothing in the law that requires us to waste time and resources or that deprives us of the legal power to order the legally appropriate [voluntary departure] remedy – a remedy already granted by the [BIA]." 896 F.2d at 16. The First Circuit has continued to follow this approach. *See, e.g., Ravindran v. INS*, 976 F.2d 754, 763 (1st Cir. 1992), and *Alvarez-Flores v. INS*, 909 F.2d 1, 8 (1st Cir. 1990).

Second Circuit

Holding that the interested party was not precluded from asking INS for reinstatement of voluntary departure, the Second Circuit declined to grant such relief itself. *Ballenilla-Gonzalez v. INS*, 546 F.2d 515, 521-22 (2nd Cir. 1976), *cert. denied*, 434 U.S. 819 (1977).

Fourth Circuit

The Fourth Circuit held that it can and will reinstate voluntary departure where INS does not indicate its

opposition on the grounds of alleged ineligibility therefor, and also where it appears that INS is unreasonably refusing to comply in cases where an individual asks it rather than the court for such relief. *Ramsay v. INS*, 14 F.3d 206, 213 (4th Cir. 1994).

Fifth Circuit

The Fifth Circuit has stated that while it may not have the power to grant or reinstate voluntary departure upon judicial review, it can review a refusal by the BIA to extend voluntary departure to cover the judicial review period. *Faddoul v. INS*, 37 F.3d 185, 192 (5th Cir. 1994). Accordingly, the *Faddoul* Court suggested that the BIA be asked to

> grant a voluntary departure period that would expire within a specified time after the Board's decision, or, if a timely petition for review were to be filed within that time and thereafter were to be ultimately denied or dismissed by the court of appeals, then within a specified period following such denial or dismissal.

37 F.3d at 192. Should the BIA refuse to do so, the court stated that it could review such a refusal. *Id.*

Seventh Circuit

In *Kaczmarczyk v. INS*, 933 F.2d 588, 598 (7th Cir. 1991), the Seventh Circuit held that it could extend voluntary departure to otherwise unsuccessful litigants, but that it would do so only upon a showing that "INS is wielding its discretion to withhold voluntary departure

to deter applicants from seeking judicial review of BIA decisions. . . . "

Eighth Circuit

The Eighth Circuit, without discussion, declined to reinstate voluntary departure in a similar case, stating merely that the individual affected "may request this relief from INS." *Alsheweikh v. INS*, 990 F.2d 1025, 1028 (8th Cir. 1993).

Ninth Circuit

In a lengthy and carefully-reasoned en banc decision limited to consideration of the issue now at bar, the Ninth Circuit ruled that a voluntary departure grant is part and parcel of the BIA deportation order being appealed to it, and thus is subject to virtually automatic reinstatement by the court upon dismissal of the appeal. *Contreras-Aragon v. INS*, 852 F.2d 1088, 1096 (9th Cir. 1988).

Tenth Circuit

The Tenth Circuit declined to exercise review over voluntary departure in *Castaneda v. INS*, 23 F.3d 1576, 1578-83, *reh'g denied*, 33 F.3d 44 (10th Cir. 1994), after extensively discussing relevant jurisprudence. While finding that it had no jurisdiction over the issue as a matter of law, it also based its approach in part upon its assumption that review could always be sought in the U.S. District Courts of a refusal by INS to reinstate voluntary departure after an appeal dismissal.

Eleventh Circuit

In *Nkacoang v. INS*, 83 F.3d 353, 357 (11th Cir. 1996) the Eleventh Circuit briefly summarized the holding of its sister Circuits, and opted to follow the approach taken by the Tenth Circuit in *Castaneda, supra.*

This issue is of great importance to litigants, because one who receives an order of deportation – even where there is no criminal or other grave misdeed involved – is barred from returning to the U.S. for five years under former 8 U.S.C. Sect. 1152(a)(6)(B), or for ten years under current 8 U.S.C. Sect. 1152(a)(9)(A)(ii). Those who depart voluntarily, by contrast, may return as soon as they are able to procure a lawful visa.

ARGUMENT

I. The U.S. Courts Of Appeals Can And Should Reinstate BIA Voluntary Departure Grants.

An individual's right to seek judicial review of a dismissal by the Board of his or her appeal would be impermissibly abrogated should that person be forced to choose between exercising that right and preserving the voluntary departure grant. *Contreras-Aragon, supra,* 852 F.2d at 1094-95. The BIA itself has recognized the injustice of placing persons in such a dilemma, and this is what led it to follow a policy of virtually automatic reinstatement of Immigration Judge grants of voluntary departure. *Id.* at 1095.

Exceptions may be made to reinstatement where the individual in question is no longer eligible (e.g., has

committed a crime) or where the appeal is determined to be frivolous. *Umanzor-Alvarado, supra,* at 16. INS is certainly free under existing judicial rules to move to that effect. Reinstatement of voluntary departure would impose only a minimal burden upon the government, as the period to be granted would likely be of only thirty days. *Contreras-Aragon* at 1096-97. It would actually save the government money, as one condition for voluntary departure under former 8 U.S.C. Sect. 1254(a) is that the individual pay for his or her ticket to leave. And while such person would not be barred from subsequent reentry, he or she would still be subject to visa requirements, inspection upon entry, and to all grounds of inadmissibility.

The approach taken by the Fifth Circuit in *Faddoul, supra,* is a commendable attempt at reconciling the various divergent analyses applied by other courts. It depends too much, however, upon whether the appealing party knows enough to recite to the BIA the talismanic language suggested by the *Faddoul* court. In the present case, Mr. Tabchouri's former counsel did not do so. The point of the present petition, however, is that if this case had arisen in the First, Fourth, or Ninth Circuit, Mr. Tabchouri would have received voluntary departure as a matter of course upon judicial review.

The Supreme Court's prime function is to reconcile just such a split in the Circuit Courts, and it should accordingly grant review in the present matter. Upon such review, it should rule that voluntary departure should be reinstated by the Circuit Courts as a matter of course, subject, as noted, to opposition upon a showing of ineligibility.

Further support for Mr. Tabchouri's position herein is found in recent legislative changes removing the ability to seek review of INS decisions over matters such as reinstatement of voluntary departure. 8 U.S.C. Sect. 1252(a)(2)(B)(i) (as amended by section 306(a)(2) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRAIRA"), Pub. L. 104-208, 110 Stat. 3009 (September 30, 1996)). As noted, one major factor relied upon by those courts refusing to reinstate voluntary departure was the availability of such relief from INS, and the possibility of judicial review in the District Courts of an unreasonable denial by INS. See, e.g., *Castaneda, supra*. The Supreme Court thus is now the only venue that can offer protection for those in Mr. Tabchouri's position, who happen to reside in the "wrong" jurisdiction.

CONCLUSION

For the reasons set forth hereinabove, a writ of certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

THOMAS PERRILL ADAMS
631 St. Charles Avenue
New Orleans, LA 70130
Telephone (504) 523-3815

Attorney of Record for
Petitioner Georges Tabchouri

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60601
Conference Calendar

GEORGE TABCHOURI,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition for Review of an Order of the
Board of Immigration Appeals
BIA No. A29-982-220

(Filed Jun. 17, 1997)

Before SMITH, STEWART, and DENNIS, Circuit Judges,

PER CURIAM:*

George Tabchouri petitions for review of the Board of Immigration Appeals's (BIA's) decision that he will not suffer "extreme hardship" if he is deported to Lebanon.

---

* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

See 8 U.S.C. § 1254(a)(1). Tabchouri has failed to establish that he will suffer the type of unique or unusually severe hardship which would compel a finding of "extreme hardship" by the BIA. *See Hernandez-Cordero v. INS*, 819 F.2d 558, 562-63 (5th Cir. 1987) (en banc). The BIA considered the relevant factors individually and cumulatively and did not find the type of hardship that a reasonable person would necessarily conclude was extreme. *Id.* at 563. Accordingly, the BIA did not abuse its discretion in denying Tabchouri's application for suspension of deportation. *See id.*

PETITION DENIED.

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL., 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

August 8, 1997

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 96-60601 Tabchouri v. INS
USDC No. A29 982 220

The following action has been taken in the appeal referenced above. The petitioner's unopposed motion to stay the mandate has been GRANTED to and including 09/07/97.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By: Lisa Adams
Lisa Adams, Deputy Clerk

Mr Lawrence B Fabacher II
Mr Thomas Perrill Adams
Ms Gretchen M Wolfinger

U.S. Department of Justice — Decision of the Board of Immigration Appeals
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A29 982 220 – New Orleans — Date: SEP 9 1996

In re: GEORGES TABCHOURI a.k.a. George Tabchouri

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Lawrence B. Fabacher II, Esquire
Gill & Fabacher
833 Baronne Street
New Orleans, Louisiana 70113

ON BEHALF OF SERVICE: Agnelis L. Reese
Assistant District Counsel

CHARGE:

Order: Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] –
In United States in violation of law

APPLICATION: Suspension of deportation; voluntary departure

ORDER:

PER CURIAM. In a decision dated August 24, 1995, the Immigration Judge found the respondent deportable as charged and denied his application for suspension of deportation under section 244(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1254(a)(1). In lieu of

deportation, the Immigration Judge granted the respondent the privilege of voluntary departure under section 244(e)(1) of the Act, 8 U.S.C. § 1254(e)(1), until October 25, 1995, with an alternate order of deportation from the United States to Lebanon. The respondent has appealed from the Immigration Judge's denial of his application for suspension of deportation. The appeal will be dismissed.

The respondent is a 28-year-old, single, male native and citizen of Lebanon, who entered the United States as a nonimmigrant student on or about March 24, 1987, with authorization to remain in this country for the duration of his student status. The respondent did not depart the United States upon the expiration of that status in December 1991. As a result, the Immigration and Naturalization Service issued an Order to Show Cause charging the respondent with deportability under section 241(a)(1)(B) of the Act, 8 U.S.C. § 1251(a)(1)(B), as an alien who remained in the United States for a time longer than permitted. At his deportation hearing, the respondent admitted the factual allegations contained in the Order to Show Cause, and conceded deportability. We affirm the Immigration Judge's finding that deportability has been established by clear, unequivocal, and convincing evidence, based on the respondent's admissions. *See Woodby v. INS*, 385 U.S. 276 (1966); 8 C.F.R. § 242.14(a) (1995).

In order to establish eligibility for section 244(a)(1) suspension relief, an alien must prove that he has been physically present in the United States for the 7 years immediately preceding his application, that he has been a person of good moral character for the same period, and that his deportation will result in extreme hardship to

himself or to his United States citizen or permanent resident spouse, child, or parent. The respondent bears the evidentiary burden of establishing statutory eligibility for suspension of deportation as well as showing that he warrants a favorable exercise of discretion. *See* section 244(a)(1) of the Act, 8 U.S.C. § 1254(a)(1); *Osuchukwu v. INS*, 744 F.2d 1136 (5th Cir. 1984); *Matter of Ige*, 20 I&N Dec. 880 (BIA 1994); 8 C.F.R. § 242.17(e) (1995).

Upon our review of the record, we find that the Immigration Judge's decision to deny the respondent's application for suspension of deportation was proper and correct. The record fully supports the Immigration Judge's conclusion that although the respondent meets the continuous physical presence and good moral character requirements of section 244(a)(1), the respondent has failed to demonstrate that his deportation from the United States to Lebanon would result in extreme hardship to himself or to his lawful permanent resident mother. *See Matter of Ige, supra; Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978).

Based on our consideration of the hardship factors, both independently and cumulatively, and upon the respondent's contentions on appeal, we find no basis for disturbing the Immigration Judge's finding that the respondent has failed to establish extreme hardship if he is deported to Lebanon. Without doubt, the respondent will face a period of readjustment upon his return to his native land, however, the readjustment is not the type of hardship that has been characterized as extreme, instead, it is the common type of hardship suffered by most aliens who have spent time abroad. *See, e.g., Matter of Chumpitazi*, 16 I&N Dec. 629 (BIA 1978). We also note that the

respondent acknowledged that his engineering degree and his knowledge of computers would enable him to find employment in Lebanon.

Accordingly, the appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and in accordance with our decision in *Matter of Chouliaris,* 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. In the event of his failure to so depart, the respondent shall be deported as provided in the Immigration Judge's order.

/s/ Illegible
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
New Orleans, Louisiana

Filed No.: A 29 982 220 August 24, 1995

In the Matter of GEORGES TABCHOURI, A/K/A GEORGE TABCHOURI Respondent	)	IN DEPORTATION PROCEEDINGS

CHARGE: Section 241(a)(1)(B) INA (remained longer than permitted after admission as a non-immigrant).

APPLICATIONS: Suspension of deportation and, in the alternative, voluntary departure.

ON BEHALF OF RESPONDENT:
Lawrence D. Fabacher, II, Esquire

ON BEHALF OF SERVICE:
John Carte, Esquire
New Orleans
District

ORAL DECISION OF THE IMMIGRATION JUDGE

Deportation proceedings were instituted by the Immigration and Naturalization Service, against the named respondent, when he was served with an Order to Show Cause which was filed with the Court (Exhibit 1). The Service alleges that the respondent is not a citizen or national of the United States but is a native and citizen of Lebanon. They allege that the respondent last entered the United States at Chicago, Illinois, on or about March 24, 1987, and was at that time admitted as a non-immigrant

student with authorization to remain in the United States for a temporary period not to exceed duration of status. Lastly, the Service alleges that the respondent remained in the United States beyond December of 1991 without authorization of the Immigration and Naturalization Service. Deportability was charged under Section 241(a)(1)(B) INA for remaining longer than permitted after admission as a non-immigrant.

The respondent admitted all allegations and conceded deportability as charged. Based upon those admissions, deportability has been established by clear, convincing, and unequivocal evidence. The respondent designated Lebanon for deportation should deportation become necessary. As relief, respondent seeks suspension of deportation pursuant to Section 244 INA. He has submitted an application in support thereof (Exhibit 3) and supporting documentation (Exhibit 3, 3A, 3B, and 3C). In the alternative, the respondent seeks to depart voluntarily in lieu of an order of deportation also pursuant to Section 244 of the Immigration and Nationality Act.

Aside from the documentary materials submitted, the respondent testified during these proceedings. Additionally, there was an offer of proof which was accepted that the respondent's sister-in-law who is a United States [sic] would testify that the respondent's mother is a lawful permanent resident in the United States who lives with the respondent at his address. There is also a stipulation for the Court to take administrative notice that the respondent's brother who is presently in the United States is the subject of a final order by this Court, issued on today's date, allowing the brother to depart voluntarily from the United States in lieu of deportation. That

as a part of the order, it was agreed to by the parties that if an immigrant visa petition is approved by the brother's United States citizen wife on the brother's behalf during the time that the voluntary departure has been authorized, that the Service would not oppose reopening of the deportation proceedings for the brother to pursue an application for adjustment of status before the Court. The Court does accept the offer of proof as agreed to concerning the testimony of the respondent's sister-in-law as well as taking administrative notice as indicated above.

To qualify for suspension of deportation, the respondent must show that he has been continuously physically present in the United States for at least 7 consecutive years immediately preceding the application. He must demonstrate that he has been a person of good moral character for at least those same 7 years. He must demonstrate that his deportation would result in extreme hardship to himself and/or a qualifying relative. Lastly, the respondent would have to show that he is deserving of a favorable exercise of discretion.

Concerning qualifying family members as relatives to show extreme hardship to if the respondent were deported from the United States, the only qualifying relative at present is his lawful permanent resident mother (Exhibit 3B). There is also an indication that the respondent's father is in the process of obtaining an immigrant visa for the United States but that it has not yet been issued. While the Court cannot under statute consider the hardship to the respondent's father at present as a qualifying beneficiary, the Court will assume for the purpose of this decision that there will be no difficulties in the obtaining of an immigrant visa by the respondent's

father. Therefore, the respondent's father would likely be a permanent resident of the United States in the near future.

The respondent has presented documentary evidence which the Court has considered even if not specifically addressed in this decision. The respondent is 27 years of age. The respondent is single with no children. The respondent first entered the United States in 1985 as a visitor and thereafter departed the United States for approximately 1 week to return to the United States in 1987 in student status. The purpose of the departure therefore was for the obtaining of the student visa at a consulate abroad. For the purpose of this decision, the Court will consider that the respondent has been in the United States since 1985 with no absences that were meaningfully interruptive. The respondent had left the United States, according to his testimony, during summer visits to his father who has been residing in the country of Togo in Africa but would always return to the United States (i.e., the respondent).

I am satisfied from the respondent's testimony as well as the documentary evidence which includes police clearance letters (*see* Exhibit 3, tab F), that the respondent is a person of good moral character for the requisite time. I'm satisfied that the respondent has also established that he has been continuously physically present in the United States for the necessary time. The issue in the case is whether the respondent has established that his deportation from the United States would result in extreme hardship to himself and/or his mother (his father in the future).

Extreme hardship within the meaning of Section 244 of the Immigration Act is not a definable term with fixed and inflexible content or meaning. It necessarily depends on the facts and circumstances peculiar to each case. In this regard, *see Matter of Huang,* 10 I&N Dec. 448 (BIA 1964). The Court has taken into account the considerations enumerated in *Matter of Anderson,* 16 I&N 596 (BIA 1978). Examples of this are the age of the respondent, the family ties in the United States, the conditions of health, the conditions to which the respondent would return in his native country, his financial status in the United States, and the other possible means of emigrating legally to the United States that the respondent might have.

Additionally, the Court has taken into account the statements of the Board of Immigration Appeals in *Matter of Ige,* Int. Dec. 3230 (BIA 1994), in which the Board notes that the United States Supreme Court has held that a narrow interpretation of extreme hardship is consistent with the exceptional nature of the suspension remedy and the cases cited therein. The Board also noted that the readjustment of an alien's life in his native country after having spent a number of years in the United States is not the type of hardship that is characterized as extreme, since similar hardship is suffered by most aliens who have spent time abroad.

As discussed previously, the respondent's mother is a lawful permanent resident and resides with the respondent in the same household in the United States. She is at present outside of the United States traveling in Lebanon (the respondent's native country), visiting the respondent's grandmother who lives in Lebanon. She is due to return to the United States shortly (Exhibit 3C). In

Lebanon, the respondent, aside from his maternal grandmother, has cousins, uncles, and aunts. They are all self-sufficient. The respondent's grandmother in Lebanon owns property through which she derives rental income. Additionally, the respondent's parents own property in Lebanon which includes rental units.

All family members which include the respondent, his United States citizen sister, the respondent's brother, and the respondent's parents are all in good health.

The respondent's mother filed an immigrant visa petition on the respondent's behalf (Exhibit 3B), which was approved by the Immigration and Naturalization Service. However, the quota is not yet current. It is often true that where relatives petition for other relatives and where quotas are involved, that persons have to wait outside of the United States for those quotas to become concurrent. This is true throughout the world; it is not limited to persons from Lebanon.

The respondent has no other means at present to obtain lawful permanent resident status other than his request for suspension of deportation.

Documentary evidence shows that the respondent attended college in the United States (Exhibit 3, tab C; and 3A, tab M), which corroborates the respondent's testimony that he graduated from the University of Southwestern Louisiana as a civil engineer, changing the degree in 1990. After graduating as a civil engineer, the respondent worked in the United States at Helmer Directional Drilling as an engineer from 1990 until June of 1993. Thereafter, the respondent (actually at the end of 1991 while still working at Helmer), along with his

brother that is in the United States, started their own business as consultants, setting up computers, selling computers, and involved in telecommunications, and that business is ongoing to present. The respondent testified that there were approximate gross revenues for this past year of $80,000 and that the year before was approximately $100,000 gross revenues. He stated that he made an investment of $100,000 approximately into the business, which included the furnishing of the office with copiers, fax machines, furniture, the purchase of computers, and the purchase of a long-distance service which is one of the main facets of this business, allowing for the servicing of his customers in Africa. The respondent states that a lot of his business is involved with the selling of computers and peripheral supporting materials and telecommunication services to his clients in Africa.

Other than a car, the property mentioned above, and personal items such as clothing, the respondent does not own any property in the United States. The respondent also owns no property in Lebanon.

The respondent speaks English, Arabic, and French fluently. The respondent acknowledges that if he were required to return to Lebanon, that he would likely be able to find employment and that his degree in engineering would be of assistance to him as would his skills and knowledge with reference to computers and telecommunication services.

As examples of ties to the United States, he indicates that he attends Catholic Church and acts as an usher, that he is involved in recreational activities such as basketball, racquetball, and tennis, that he is working as a volunteer

in the political campaign of a judge, that he has given donations to various groups, etc.

When asked why he believes it would be an extreme hardship if he were required to leave the United States, he points primarily to his family being in the United States, that he has lived here for approximately 10 years, and that he has the business in the United States.

The respondent also testified that he has a close family and that they have always lived together. This is actually not borne out by the evidence as far as their always living together. For example, the respondent's father has lived for all these years in Togo in Africa, and the respondent would visit during summers. The respondent's sister who is a United States citizen (Exhibit 3, tab K, Maya Schneider) lives in Buffalo, New York, whereas the respondent lives in Louisiana. The respondent's sister has been living in New York for several years. The only other family members that respondent has in the United States are his mother (who has filed a petition for immigrant visa on behalf of the respondent), as well as the respondent's brother (who as previously mentioned is under a final order in administrative proceedings, although married to a United States citizen, and the hope of the individual is to legalize status in the United States in the future).

It is clear to the Court that the respondent does not wish to be uprooted. He wants to be able to remain in the United States, which is the nature of the application for suspension of deportation. This is understandable. However, it is not merely a determination of whether a person is a good person or whether a person will ultimately be

able to be in the United States, but whether they can demonstrate that their deportation will be an extreme hardship to themselves or a qualifying family member. I cannot find in the evidence presented that the respondent has demonstrated that his deportation would result in an extreme hardship to himself, his mother, or in the near future, his father, assuming that the immigrant visa processing goes through. The respondent is not a child of tender years. He is an adult and apparently self-sufficient. There is no reason that his business could not be functioning either in its present form or in an altered form in Lebanon, and the respondent acknowledges that he probably would be able to find work either with his knowledge of computers, telecommunications, or with the use of his engineering degree.

As previously mentioned, it is often a fact of life that people must wait in order to be processed for immigrant visas. This is also true for the respondent. I do not find that his removal from the United States rises to the level of extreme hardship and, for that reason, his application must fail.

For the foregoing reasons and based upon the record as a whole, the request for suspension of deportation is denied. The Court notes that it is not making this determination based upon its discretion but solely as the respondent cannot demonstrate that his deportation would result in an extreme hardship to himself and/or any qualifying family member.

Turning to the alternate form of relief of voluntary departure, the respondent must show that he is a person of good moral character within the last 5 years, that he is

able and willing to depart the United States voluntarily if so requested by the United States Government, and that he is deserving of that relief in the discretion of the Court.

The Court is satisfied that the respondent has demonstrated that he qualifies for that relief, and the Court sees no reason to deny this in its discretion. The customary period of voluntary departure is 30 days. As the respondent shares a business in the United States with his brother and has been in the United States for an extended period of time, the Court will grant the respondent until October 25, 1995, to depart voluntarily at no cost to the United States Government. It is further ordered that if he fails to leave by that date or by such date as may be extended by Immigration, that the privilege shall be withdrawn without further notice or hearing, and it will convert automatically to an order of deportation to Lebanon.

/s/ Jeffrey Zlatow
JEFFREY ZLATOW
Immigration Judge

(2)

Supreme Court, U.S.
FILED
NOV 10 1997
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No. 97-406

In the Supreme Court of the United States

OCTOBER TERM, 1997

GEORGES TABCHOURI, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals should have ordered an extension of the time allowed by the Board of Immigration Appeals for petitioner to depart voluntarily from the United States in lieu of deportation, when petitioner never requested that relief.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is unpublished, but the decision is noted at 119 F.3d 3 (Table). The orders of the Board of Immigration Appeals (Pet. App. 4-7) and the immigration judge (Pet. App. 8-17) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1997. The petition for a writ of certiorari was filed on September 4, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a native and citizen of Lebanon, entered the United States as a nonimmigrant student in March 1987. Pet. App. 5, 8-9. Petitioner did not leave the United States when his student visa expired in December 1991. *Id.* at 5, 9. The Immigration and Naturalization Service (INS) initiated deportation proceedings against petitioner under former Section 241(a)(1)(B) of the Immigration and Nationality Act (INA), 8 U.S.C. 1251(a)(1)(B) (1994), on the ground that he had remained in the United States beyond the period authorized by his visa. Pet. App. 5, 9.

Petitioner admitted the truth of the INS's factual allegations and conceded deportability, but he sought discretionary relief in the form of suspension of deportation under former Section 244(a) of the INA, 8 U.S.C. 1254(a) (1994). Pet. App. 9. Alternatively, he requested, under former Section 244(e)(1) of the INA, 8 U.S.C. 1254(e)(1) (1994), the opportunity to depart from the United States voluntarily, rather than be deported. Pet. App. 9.

In August 1995, after an evidentiary hearing (see Pet. App. 9), an immigration judge (IJ) found that petitioner had failed to establish that his deportation would give rise to the "extreme hardship" required to make him statutorily eligible for suspension of deportation. *Id.* at 12-16; see 8 U.S.C. 1254(a)(1) (1994). In particular, the IJ found (Pet. App. 12-16) that petitioner is a well-educated, self-sufficient adult; that he should be able to obtain employment in Lebanon, or to continue or replicate his present computer and telecommunications consultancy business there; that he has several relatives in Lebanon, all of whom are also self-sufficient; that his family owns income-producing

property in Lebanon; and that all the members of his family are in good health. The IJ also noted (*id.* at 13) that the INS has approved the issuance of an immigrant visa for petitioner, but that the visa could not yet be issued because of applicable quota restrictions.

Although the IJ found petitioner ineligible for suspension of deportation, he did grant petitioner's request for voluntary departure. Pet. App. 16-17. Because petitioner had been in the United States for an extended period and owned part of a business in this country, the IJ allowed him 60 days (rather than the usual 30 days) in which to depart the United States. *Id.* at 17. If petitioner failed to depart voluntarily within that time, he was to be deported to Lebanon. *Ibid.*

The Board of Immigration Appeals (BIA) upheld the IJ's decision. Pet. App. 4-7. While it recognized that petitioner would face a "period of readjustment" upon his return to Lebanon, the Board found "no basis for disturbing the Immigration Judge's finding that [petitioner] has failed to establish extreme hardship if he is deported to Lebanon." *Id.* at 6. The Board also concurred in the IJ's grant of voluntary departure, according petitioner an additional departure period of 30 days from the date of its order, "or any extension beyond that time as may be granted by the [INS] district director." *Id.* at 7.

Petitioner sought review of the BIA's decision in the court of appeals, under the provision for such review contained at that time in Section 106(a) of the INA, 8 U.S.C. 1105a(a) (1994). In a brief per curiam opinion (Pet. App. 1-2), the court affirmed the BIA's order, holding (*id.* at 2) that petitioner had "failed to establish that he will suffer the type of unique or un-

usually severe hardship which would compel a finding of 'extreme hardship,'" and that the Board had not abused its discretion in denying his application for suspension of deportation.

ARGUMENT

1. Petitioner argues (Pet. 8-10) that time accorded him by the Board of Immigration Appeals to depart voluntarily from the United States, rather than be deported, should be reinstated or extended to run from the date of the court of appeals' judgment affirming the Board's denial of other relief. Petitioner did not request that relief either from the court of appeals or from the BIA, and the court of appeals did not address the issue of voluntary departure. See Pet. App. 1-2; Pet. 9; Pet. C.A. Br. 1, 4-8.[1] Petitioner's claim may not be presented to this Court in the first instance. 8 U.S.C. 1105a(c) (1994) (requiring exhaustion of administrative remedies); see 8 U.S.C. 1252(d)(1) (Supp. II 1996) (same requirement after recent amendments); see also, *e.g.*, *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992); *Demarest* v. *Manspeaker*, 498 U.S 184, 188-189 (1991); *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981).

2. In any event, petitioner's claim is without merit. The Court recently denied review in another case presenting the same question (*Osaren* v. *INS*, No. 96-1653 (Oct. 6, 1997)), and there is no reason for a different result here.

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[1] Petitioner's brief in the court of appeals presented for review only the following question: "Did the Board of Immigration Appeals abuse its discretion by concluding that the Petitioner did not meet the legal prerequisites for suspension of deportation because he had failed to establish that his deportation would result in extreme hardship?" Pet. C.A. Br. 1.

At the time petitioner was found to be deportable, Section 244(e) of the INA, 8 U.S.C. 1254(e) (1994), permitted the Attorney General, in her discretion, to allow any deportable alien who met certain basic qualifications to depart voluntarily from the United States in lieu of deportation. The Attorney General delegated that authority to immigration judges and the BIA in the first instance, and she committed decisions to reinstate or extend the time for voluntary departure in most cases to the "sole jurisdiction" of the INS's various district directors. 8 C.F.R. 244.1-244.2 (1994), revised and renumbered as 8 C.F.R. 240.56-240.57 (62 Fed. Reg. 10,377 (Mar. 6, 1997)). As petitioner observes (Pet. 8), one principal advantage of voluntary departure, from the point of view of a deportable alien, was that it avoided application of the five-year bar imposed by former Section 212(a)(6)(B) of the INA, 8 U.S.C. 1182(a)(6)(B) (1994), on reentry by deported aliens without the specific consent of the Attorney General.

Petitioner argues (Pet. i, 8-10) that an alien should not be forced to choose between seeking judicial review of an order of deportation and taking advantage of a grant of voluntary departure that may expire before review has been completed. Even if petitioner had been put to that choice, his claim would be insubstantial. An alien who has been found to be deportable has no right to voluntary departure, and a choice between taking advantage of that discretionary benefit (on the terms on which it is offered) and pursuing additional legal process as of right (at the end of which the government might prove less accommodating) is little different from the choice that routinely faces criminal defendants in deciding whether to enter into a plea agreement with the government.

See *Castaneda* v. *INS*, 23 F.3d 1576, 1581-1582, on denial of reh'g, 33 F.3d 44 (10th Cir. 1994); compare *Brady* v. *United States*, 397 U.S. 742, 749-753 (1970). Congress has committed the decision whether, and on what conditions, to grant voluntary departure to an eligible alien to the discretion of the Attorney General, and a reviewing court has no authority to extend or reinstate a voluntary departure order that has expired by its terms. See *Castaneda*, 23 F.3d at 1583.

In fact, however, petitioner was not put to the choice that he posits. As petitioner points out (Pet. 6, 9), the Fifth Circuit had, under prior law, asserted the right to review a decision by the BIA not to grant a request, made by an alien in deportation proceedings, to establish a voluntary departure period that would expire only within a specified time after the resolution of any appeal. *Faddoul* v. *INS*, 37 F.3d 185 (1994). Petitioner concedes (Pet. 9), however, that he did not make any such request to the BIA. Having failed to do so, he is not well placed to argue that the failure to accord him such an extension sua sponte somehow compromised his statutory right to seek judicial review.

Finally, we note that petitioner does not allege that he has requested reinstatement or extension of his time for voluntary departure from the INS district director, or that the district director has denied any such request. Having enjoyed a stay of deportation pending appeal, under former Section 106(a)(3) of the INA, 8 U.S.C. 1105a(a)(3) (1994), and having obtained a stay of the court of appeals' mandate pending the disposition of this petition (Pet. App. 3; see Fed. R. App. P. 41(b)), petitioner has, to date, faced no immediate danger of deportation. While petitioner cannot, more than a year after the BIA's decision (see Pet. App. 4),

plausibly contend that he requires any substantial additional amount of time to wind up his affairs in the United States, there is no reason to assume that the appropriate INS district director would deny a timely request by petitioner for reinstatement of a brief period for voluntary departure.[2]

3. As petitioner points out (Pet. 4-8), the courts of appeals adopted different approaches to reviewing deportable aliens' requests for judicial orders reinstating or extending the time for voluntary departure accorded them under former Section 244(e) of the INA, 8 U.S.C. 1254(e) (1994). Some courts correctly held that they lacked jurisdiction to reinstate or extend an administrative grant of voluntary departure under that provision. See, *e.g.*, *Nkacoang* v. *INS*, 83 F.3d 353, 356-357 (11th Cir. 1996); *Castaneda*, 23 F.3d at 1578-1583 (reviewing cases). Other courts asserted jurisdiction to reinstate or extend such a grant under varying circumstances. See, *e.g.*, *Faddoul*, *supra*; *Ramsay* v. *INS*, 14 F.3d 206, 211-213 (4th Cir. 1994) (while decision should "usually" be left to district director, court will extend departure period where INS does not suggest any reason for district director to deny reinstatement apart from alien's decision to appeal); *Contreras-Aragon* v. *INS*, 852 F.2d 1088 (9th Cir. 1988) (en banc) (period for voluntary departure does not begin to run until issuance of

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[2] That decision would, of course, rest solely in the discretion of the district director, and we make no representation that such a request would be granted. Our point is simply that petitioner offers no reason to believe that district directors routinely refuse to reinstate or extend the time for voluntary departure for an otherwise eligible alien simply because the alien has sought judicial review. See *Kaczmarczyk* v. *INS*, 933 F.2d 588, 598 (7th Cir.), cert. denied, 502 U.S. 981 (1991).

court of appeals' mandate affirming BIA's order). As noted above (see page 6, *supra*), the Fifth Circuit in *Faddoul* established a procedural mechanism under which petitioner could have obtained judicial review if the BIA had denied a request to extend the period of departure to accommodate an appeal, and the divergence in approach that petitioner identifies is therefore of limited relevance to this case. To the extent, however, that petitioner might have received even more favorable treatment in some other circuit (see Pet. 9), recent statutory changes have deprived the issue of any continuing importance.

On September 30, 1996, the President signed into law the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. Section 309(c)(4)(E) of IIRIRA, 110 Stat. 3009-626, provides that, in judicial review of any final order of deportation entered on or after October 31, 1996, "there shall be no appeal of any discretionary decision under section * * * 244" of the INA (as in effect when IIRIRA was enacted). Because former Section 244(e) conferred the authority for grants of voluntary departure, IIRIRA settles, prospectively, any dispute about a court of appeals' authority to review or alter the BIA's exercise of the Attorney General's discretion in that regard.

In addition, Section 308(b)(7) of IIRIRA, 110 Stat. 3009-615, repeals former Section 244 in its entirety, as part of a general revision of the provisions relating to deportation (now known as "removal"). Former Section 244(e) has been replaced with new Section 240B of the INA, 8 U.S.C. 1229c (Supp. II 1996), providing for the discretionary grant of voluntary departure under certain circumstances. New Section 240B(f), 8 U.S.C. 1229c(f) (Supp. II 1996), specifies

that "[n]o court shall have jurisdiction over an appeal from denial of a request for an order of voluntary departure" entered at the conclusion of removal proceedings; and new Section 242(a)(2)(B), 8 U.S.C. 1252(a)(2)(B) (Supp. II 1996), reiterates that, "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review * * * any judgment regarding the granting of relief under section * * * 240B."

Neither IIRIRA's preclusion of judicial review of decisions under old Section 244(e) nor its new provisions concerning voluntary departure apply to petitioner's case, because the administrative deportation proceedings against petitioner were commenced and concluded before October 31, 1996. See IIRIRA § 309(a) and (c), 110 Stat. 3009-625. In light of the statutory changes and jurisdictional clarifications enacted by IIRIRA, however, the issue that petitioner seeks to raise in this case is of no continuing importance and does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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